City Attorney Law Letter

C.A.L.L.

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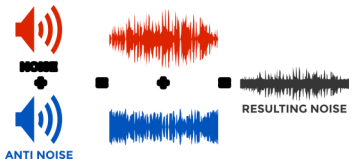
NOISE ORDINANCE EXPLAINED



Amplified Sound

Over the course of this summer, it seems that there has been an increase in the number of noise disturbance calls in our city. Many of these calls involve outdoor karaoke, live bands, or "jumpy houses" in residential areas. While it may seem common sense that having karaoke or a live band in the backyard at 1:00 a.m. would be disturbing to neighbors, there seems to be a lot of people who don't see it that way. In addition, it seems that the calls are increasing for complaints of loud music from bars and event centers as well. The most common noise complaints have to do with noise originating from places like Zabana, Civic Center, Pachenga, and the Metroplex. Some of these places have been disturbing citizens for years, but enforcement has been spotty at best.

To simplify the enforcement of the noise ordinance, the Springdale City Council in 2014 passed an amendment to the noise ordinance to make it easier for the Police Department to enforce the noise ordinance in these situations, and to reduce the reliance on decibel readings in situations involving "amplified sound". Specifically, the ordinance amended section 42-51 of the Code of Ordinances to change the definition of "noise disturbance" to read as follows:

Noise disturbance means:

(1) The creating of any unreasonably loud and disturbing sound of such character, intensity, or duration as to be detrimental to the life or health of an individual, or which annoys or disturbs a reasonable person of normal sensitivities.

(2) Owning, keeping, possessing, or harboring any animal or animals that continuously, repeatedly, or persistently, without provocation by the complainant, creates a sound which unreasonably disturbs or interferes with the peace, comfort or repose of persons of ordinary sensibilities.

(3) The creating of any unreasonably loud and disturbing sound by a sound amplification device of such character, intensity, or duration as to be detrimental to the life or health of an individual, or which annoys or disturbs a reasonable person of normal sensitivities.

The language added in 2014 is found in (3) above. In other words, if noise caused by a "sound amplification device" is of such a character, intensity, or duration that it annoys or disturbs a reasonable person, then it is a violation *regardless of the decibel reading.* This is an important point to remember when a noise complaint comes in at 2:00 a.m., and the caller reports that the thumping bass from the music down the street, or from the bar down the road, is keeping the caller awake. If the officer verifies these facts by hearing it from where the complaint is called in from, and can truthfully testify that the noise is of such a character to annoy or disturb a reasonable person, then the officer has probable cause to write a citation for a noise ordinance violation to the person who is causing the noise disturbance.

Certainly, an officer has the discretion whether or not to write a citation once a noise disturbance is confirmed. The officer has the discretion to advise the person causing the noise disturbance to "turn it down or a ticket will be written", or the officer can choose to write a ticket without giving the person that opportunity. I have noticed on many of these calls, that officers are dispatched 2 or 3 times to the same location before the party/music is finally ended for the night. This seems like a lot of needless running back and forth. Hopefully, being armed with an accurate definition of what constitutes a violation of the City's noise ordinance will reduce the need to return to the same location over and over, and will certainly provide the complaining citizens some long-awaited peace and quiet.

Music from Vehicles

There also seems to be an increase in the number of calls regarding noise originating from a vehicle. Certainly, this would also fall within a "sound amplification device" under Section 42-51(3) above. In addition, Section 42-55 of the Code of Ordinances states as follows:

> (a) It is unlawful to operate any sound amplification device from within a vehicle so that the sound is plainly audible at a distance of 30 feet or more from the vehicle, whether in a street, a highway, an alley, parking lot or driveway, whether public or private property, and such is declared to be a noise disturbance in violation of this chapter.

In other words, if a person is sitting in their living room, and the neighbor drives by with the music thumping so loud that it offends the caller, it is a violation. I personally have seen (heard) this over and over near the intersection of Don Tyson Parkway and Old Missouri Road. It seems that it is literally one vehicle after another driving by with loud music or thumping bass, making it impossible for anyone living in the vicinity to enjoy their homes.

Many times, officers will hear music or thumping as a vehicle passes them, or while sitting at a traffic signal. This is a violation, and is also a legitimate basis for a traffic stop. There are obvious safety reasons for a driver not to have the music too loud. After all, what if you were running code and the driver could not hear your siren because the music was too loud?

Another common example are vehicles parked at convenience stores or gas pumps. For some unknown reason, many people are fond of leaving their music blaring or thumping while they are pumping gas or make a purchase in the store. If it is of such a character to offend someone, or if it can be heard at a distance of more than 30 feet away, it is a violation. It seems like every time I get gas, I witness such a violation.

Hopefully this explanation will provide you with a better understanding of the City's noise ordinance. It can also be a wonderful crime suppression tool, as it provides a basis for a traffic stop, or provides a basis to make contact with an individual. By enforcing the noise ordinance, you may be preventing a more serious offense from taking place.

A soft answer turns away wrath, but a harsh word stirs up anger. Proverbs 15

If you have any questions about the City's noise ordinance, please feel free to contact me at any time.

This Article Presented by
Ernest Cate, City Attorney

Open Carry in Arkansas: It's Legal… Except When it Isn't

The Attorney General's office has changed its position on open carry as it applies to Ark Code Ann 5-73-120, misdemeanor "carrying a weapon." The Attorney General's new opinion is that open carry is not *per se* illegal under this statute, but it is not legal in all circumstances. This article is an overview of the new Attorney General's opinion. Please keep in mind that the Attorney General's opinion is a guideline but is not the law; we will likely see developments in case law in the months to come.

The opinion:

The Attorney General believes that "in general, merely possessing a handgun on your person or in your vehicle does not violate other laws and regulations." However, the Attorney General says that there are caveats to this rule.

Caveats:

"First, any person who carries a handgun should be aware that a law enforcement officer might lawfully inquire into that person's purpose."

All rules regarding consensual contact remain the same. All rules regarding reasonable suspicion remain the same. However, it does not appear that simply carrying a weapon gives rise to reasonable suspicion

"Second, other statutes prohibit possession of a handgun in certain circumstances regardless of whether a person has the intent to use a handgun unlawfully."

It is illegal to have a firearm at a certain location – for example, on school grounds. It is still illegal to have handguns at those locations. Legality of open carry would not affect that.

"Third, a private property owner or occupant is still entitled to keep handguns (and other firearms) and persons with handguns (and other firearms) off his, her, or its property."

Again, the law does not create new locations where people can carry guns. As always, if a person does not want you to have a gun on their private property, then they can require you to leave.

"Fourth, the laws requiring a license to carry a concealed handgun still have full force and effect."

Nothing changes about concealed carry laws. All requirements are still the same.

Final Thoughts:

Open carry is not necessarily the law of the land, but it is the opinion of the Attorney General that it is. Some jurisdictions have chosen to prosecute open carry. The City Attorney's Office will update you when the Courts give a more definitive answer on this issue.

This Article Presented by
Sarah Sparkman, Deputy City Attorney

8th U.S. Circuit Court of Appeals Holds that Officer Who Did Not Intervene in Excessive Force Case Was Entitled to Qualified Immunity

FACTS TAKEN FROM THE CASE:

On September 13, 2011, Eva Robinson and her son Matthew Robinson were walking their dog in front of their home near Dover, Arkansas, when Steven Payton, a part-time Deputy Marshal for the City of Dover Marshal's Office, observed "suspicious people walking." Deputy Payton saw one of the suspicious people, Matthew, throw something into the grass, before deciding to stop Matthew and Eva on the sidewalk. The Robinsons' dog ran away, and after Matthew retrieved the dog, Deputy Payton placed Eva, Matthew, and their dog inside his patrol car.

While the Robinsons were inside the patrol car, Pope County Deputy Sheriff Kristopher Stevens and Arkansas State Trooper Stewart Condley arrived at the scene. After discussing the situation, all three police officers walked toward the patrol car, and Deputy Stevens asked Matthew to exit the vehicle. Matthew did not exit, and Deputy Stevens tased Matthew while Matthew was in the backseat. The parties disagree about what happened before Matthew was tased. According to the Robinsons, Matthew was tased while he was struggling to get out of the backseat. Eva claimed that Matthew was tased without warning very shortly after being asked to get out of the car. Matthew said that one of the officer's arms was inside the car as he was attempting to exit the vehicle, and Matthew said that he reached for the arm for assistance to exit the car. Trooper Condley stated that Matthew refused to exit the vehicle after multiple requests, and that Deputy Stevens told Matthew that he would be tased if he did not exit the car.

While Deputy Stevens was tasing Matthew, Eva tried to shield Matthew. In response, Trooper Condley walked around the back of the patrol car, removed Eva from the car, and handcuffed her. Deputy Payton then pulled Matthew from the car and drive-stunned him at least twice while Matthew was standing. At some point, Deputy Payton took Matthew to the ground behind the patrol car and drive-stunned him at least twice. Photos of Matthew from after the altercation show at least fifteen taser marks. While Matthew was being tased, Trooper Condley was attempting to control Eva on the other side of the car. Trooper Condley placed Eva in handcuffs on the sidewalk next to the patrol car. Eva was not familiar with tasers and believed that the officers were shooting Matthew with a handgun. Eva urinated on herself and screamed for her husband. Trooper Condley was holding Eva down so that she could not go to Matthew. Eva at one point broke free and moved toward the officers and Matthew before Trooper Condley grabbed her and slammed her onto the hood of the patrol car. Eva was charged with disorderly conduct, refusal to submit to arrest, and criminal mischief. Matthew was charged with refusal to submit to arrest.

The Robinsons sued the City of Dover, the Dover Marshal's Office, Pope County, and the Pope County Sheriff's Department. They also sued individually and officially Deputy Payton, Deputy Stevens, Trooper Condley, Sheriff Duvall, and Marshal Pfeifer. The Robinsons alleged violations of their federal and state constitutional rights. In relation to Trooper Condley, Matthew Robinson alleged under 42 U.S.C. § 1983 that Trooper Condley failed to stop another law enforcement officer's use of excessive force. Trooper Condley filed a motion for summary judgment asserting qualified immunity. The district court denied the motion, holding that a jury could find that Trooper Condley violated Matthew Robinson's clearly established constitutional right to be

free from excessive force. Trooper Condley appealed the denial of his motion for summary judgment to the Eighth U.S. Circuit Court of Appeals.

ARGUMENT, APPLICABLE LAW, AND DECISION BY THE 8TH U.S. CIRCUIT COURT OF APPEALS:

On appeal to the Eighth U.S. Circuit Court of Appeals (Court), Trooper Condley argued that he was entitled to qualified immunity for three reasons: (1) he did not observe or have reason to know the two other officers were applying excessive force to Matthew; (2) he did not have a duty to intervene because he did not have the opportunity and means to do so; and (3) the duty to intervene in the specific circumstances of the case (when occupied with another person on the scene) was not clearly established.

In setting forth the rule on qualified immunity, the Court said that an official is entitled to qualified immunity unless the evidence, viewed in the light most favorable to the nonmoving party, establishes a violation of a federal constitutional or statutory right, and the right was clearly established at the time of the violation. The Court said that in addressing whether a right is clearly established, the salient question is whether the state of the law at the time of an incident provided fair warning to the defendants that their alleged conduct was unconstitutional. The Court continued that qualified immunity therefore provides ample protection to all but the plainly incompetent or those who knowingly violation the law. Furthermore, the Court said that existing precedent must have placed the statutory or constitutional question confronted by the official beyond debate. Finally, the Court said that a police officer may be liable for not intervening to prevent the use of excessive force when the officer observed or had reason to know that excessive force would be or was being used, and the officer had both the opportunity and the means to prevent the harm from occurring.

The Court held that Trooper Condley's duty to intervene was not clearly established in the specific context of his case, and he was therefore entitled to qualified immunity as a matter of law. In its reasoning, the Court noted that Trooper Condley at the scene was restraining Eva, who was acting hysterically and unpredictable. The Court concluded that a reasonable official standing in Trooper Condley's shoes would not understand what he is doing (restraining a hysterical individual on the scene and deciding not to leave the individual and intervene) violates clearly established law. The Court stated that Trooper Condley's decision to stay with Eva and not to intervene did not transgress a bright line; had he left Eva, she could have and likely would have joined the altercation, possibly harming herself or others. For these reasons, the Eighth U.S. Circuit Court of Appeals reversed the district court and held that Trooper Condley was entitled to qualified immunity.

Case: This case was decided by the United States Court of Appeals for the Eighth Circuit on June 29, 2015, and was an appeal from the United States District Court for the Eastern District of Arkansas. The case citation is *Robinson v. Payton* , ___ F.3d ___, (2015).

This Article Presented by

Taylor Samples, Senior Deputy City Attorney

Substantial Step/Abandonment—Once an Attempt is Completed, the Defense of Abandonment is no Longer Available

James Eugene Larive, Jr. was convicted in the United States District Court for the District of South Dakota - Rapid City, of attempted commercial sex trafficking. He appealed his conviction on the grounds, *inter alia*, that he had abandoned his intent of committing this crime against a minor child.

I. Facts.

Beginning in August 2013, the South Dakota Division of Criminal Investigation (DCI) and the Federal Bureau of Investigation set up a sting operation targeting sex trafficking during the Sturgis Motorcycle Rally in western South Dakota. As part of the operation, agents posted advertisements on websites offering young girls for prostitution.

On August 9, DCI Special Agent Brian Schnabel posted an advertisement on the Rapid City Craigslist website titled "End of Rally -w4m -18 (Sturgis area)." The content of the advertisement read "Travelin through for the area and lookin. Fresh young thing. very discrete and serious response only." Schnabel testified that the "fresh young thing" language in the advertisement would indicate to someone familiar with the terminology that the poster was offering children for sex.

Larive responded to the advertisement by e-mail. Schnabel, under the assumed name "Terry Smith," offered to sell Larive a half hour of sex with a young girl for $150, or an hour of sex for $200. After Schnabel sent a photograph of a female state employee modified to appear underage, Larive asked whether he could make a trade [*3] instead of paying cash. Schnabel then informed Larive that the girl was fifteen years old. After some negotiation, Larive agreed to trade a cell phone for an hour of sex with the fifteen-year-old girl.

Larive and Schnabel (as "Smith") agreed to meet at a Hardee's restaurant in Belle Fourche, South Dakota at 8:00 p.m. the same day. Once the arrangement was made, DCI task force commander Troy Boone and Special Agent Toby Russell drove from Sturgis to Belle Fourche to conduct surveillance on Larive in anticipation of the meeting. At the same time, an agent acting in an undercover capacity drove to the Hardee's restaurant in a vehicle that Larive was told would be driven by "Smith."

Boone and Russell observed Larive leave his residence shortly after 8:00 p.m. Larive drove to a gas station next to the Hardee's in Belle Fourche. Boone testified that the parking lot of the Hardee's was visible from the gas station. After several minutes, Larive left the gas station, driving south out of Belle Fourche for approximately one mile, and then drove west.

Boone and Russell observed Larive return to the gas station about ten minutes later. At this point, the undercover vehicle was parked in the Hardee's [*4] parking lot. Larive drove through the gas station parking lot and into the Hardee's lot. He proceeded slowly through the Hardee's lot, past the undercover vehicle, and then exited the lot.

Larive drove north about one mile, for fewer than four minutes, at which point Boone and Russell initiated a traffic stop. After arresting Larive, Boone and Russell recovered a cell phone from his vehicle. Larive admitted that he had discussed trading the phone for sex with a fifteen-year-old girl, and that he was

going to Hardee's to meet the girl, but claimed that he was not going to go through with it until he talked to "Smith."

United States v. Larive, 2015 U.S. App. LEXIS 13044, 2-4 (8th Cir. S.D. July 28, 2015)

II. Law.

A person is guilty of an attempt if that person takes a "substantial step" toward committing the crime, short of completion. The US Eight Circuit Court of Appeals quoted the definition articulated in *United States v. Blue Bird*, 372 F.3d 989, 993 (8th Cir. 2004):

> A substantial step must be something more than mere preparation, yet may be less than the last act necessary before the actual commission of the substantive crime. . . . In order for behavior to be punishable [*6] as an attempt, it need not be incompatible with innocence, yet it must be necessary to the consummation of the crime and be of such a nature that a reasonable observer, viewing it in context could conclude beyond a reasonable doubt that it was undertaken in accordance with a design to violate the statute.
>
> *United States v. Larive*, 2015 U.S. App. LEXIS 13044, 5-6 (8th Cir. S.D. July 28, 2015)

Basically, the prosecution must show necessity of action and design of purpose to prove an attempt. A necessary act must be committed in pursuit of a plan designed to violate a statute. The act must be more than mere preparation to be considered "substantial." There are no "bright line" rules as to where the transition point between "mere preparation" and a "substantial step" is to be drawn. This determination is a fact-intensive question of degree.

Abandonment is a defense to the charge of attempt. Abandonment is a claim by the Defendant that he relinquished any criminal intent prior to a violation. Abandonment takes place before the substantial step is taken.

III. Analysis.

The case was tried before a jury. The facts were largely not in dispute. Defendant argued that the act of traveling to the location was, in itself, insufficient to substantiate a charge of attempt and that he abandoned his intent to commit the crime as illustrated by his leaving the scene before making contact. The Government argued that the pre-meeting negotiations and the travel were a substantial step. The jury agreed. On appeal, the US Eighth Circuit reviewed the claim of insufficient evidence to convict on the crime of Attempts.

Defense argued that the prior Eighth Circuit holding in *United States v. Joyce*, 693 F.2d 838 (8th Cir. 1982), required his acquittal. In that case, the Defendant met an undercover officer in a hotel in St. Louis and demanded to see the cocaine that the undercover officer had offered to sell. The officer demanded to see the money, which lead to an impasse. Joyce left the room and was arrested and charged with attempting to possess cocaine with intent to distribute. Joyce was acquitted on appeal with the holding that the Government had not proven intent.

In this case, the Court did not make any clear distinctions between the case at bar and *Joyce*. The Court merely acknowledged the question of degree is a factual one to be answered by a jury and in this case, a reasonable jury could have concluded the proven facts of negotiation and travel to a remote meeting location were a substantial step.

The Court held that once an attempt is completed, the defense of abandonment is no longer available. This means that once the Government has proven the design to violate and the necessary act, the crime of Attempts is complete.

The conviction was affirmed.

Case: *United States v. Larive,* 2015 U.S. App. LEXIS 13044, 2-4 (8th Cir. S.D. July 28, 2015).

This Article Presented by
David Phillips, Deputy City Attorney

Hearsay and Context—

U.S. v. Lemons

Brandy Lemons was convicted of making a false statement to the government and theft of government funds in connection with fraudulent receipt of social security disability benefits. The district court sentenced her to a term of 12 months and a day in prison. Lemons appealed her conviction on various grounds, to include an objection to hearsay admitted at trial from a Facebook conversation string. Lemons claimed that the unknown third-party comments were prejudicial and should have been excluded from the trial.

I. Facts.

> Lemons applied for social security disability benefits in June 2009 after she was diagnosed with arachnoiditis, a pain disorder caused by inflammation of a membrane that surrounds the nerves of the spinal cord. In her application, Lemons asserted that pain and fatigue required [*2] her to limit her activities, and that all physical activity caused her additional pain in her neck, back, and legs.
>
> ... In May 2010, Lemons began to receive $802 per month. ...
>
> In June 2011, the Administration received an anonymous letter disclosing that Lemons was capable of engaging in physical activities that were inconsistent with her claim of a back injury. The mailing included photographs of Lemons using a chainsaw to cut tree limbs while in the tree and then cutting those limbs into smaller pieces on the ground. The pictures also captured Lemons pulling her three-year-old son up a hill in a wagon. At trial, another son, John David Jackson, testified that he took these photographs in June 2011.
>
> The Administration started an investigation. Investigators ... discovered posts on Lemons's Facebook page suggesting that Lemons hunted game with a bow, attended hunter safety classes, and rode an all-terrain vehicle for two hours.
>
> In October 2011, the Administration initiated [a] follow-up review ... Lemons responded that she had no hobbies or interests, could not pick up anything over 20 pounds without causing increased pain, and could not sit more than thirty minutes without experiencing additional pain. She wrote that any physical activity caused increased pain, and that her condition affected her ability to lift, bend, stand, walk, and concentrate. She said that her condition took away her ability to enjoy life
>
> ....
>
> A grand jury eventually charged Lemons with two counts of making a false statement, in violation of 18 U.S.C. § 1001, and three counts of theft of government funds, in violation of 18 U.S.C. § 641. The case proceeded to trial, and a jury found Lemons guilty on the three counts of theft and one count of making a false statement. The false-statement count of conviction alleged that Lemons represented to the Administration that she had no hobbies or interests, could not pick up anything over 20 pounds without causing increased pain, and that sitting more than 30 minutes caused additional pain, when in fact Lemons attended hunter safety classes, bent and lifted objects and people, hunted deer during bow season, regularly practiced bow hunting with a 30-pound compound bow, attended a concert, and rode an all-terrain vehicle for two hours.
>
> *United States v. Lemons*, 2015 U.S. App. LEXIS 11631, 1-5 (8th Cir. Mo. July 7, 2015)

II. Law.

"Hearsay" is a statement, other than one made

by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. ARE 801. Hearsay is not admissible [into evidence at trial] except as provided by law or by these rules. ARE 802.

III. Analysis.

Part of the evidence gathered by investigators against Ms. Lemons included a Facebook conversation about a hunting safety class in which the other person involved in the conversation is not known to the Government:

- "How come shootin makes you feel so good?"
- "I can shoot my bow all I want to here at the house, but I am soooo ready to move so I can walk out my back door and let the lead fly!"
- "Goin to look at 95 acres in the morning. . . . If the land ain't right for us at least I get to spend some time with my wonderful husband and enjoy Gods great creation from the back of a 4 wheeler."
- "The land wasn't exactly what we [are] looking for. . . . But we spent 2 hours ridin and lookin and I only had to tell him which way to go a dozen times!"
- "The boys have gone fishing while I'm stuck here in this dang hunter safety class."
- "Since I did so well on my test, I get to accessorize my new bow. . . . So now we r shopping at Cabela's."
- "2 weeks till Bow Season starts and 3 weeks till TB/EC concert . . . it's lookin like a good [month]."
- "The count down has begun. . . .1 month till the TOBY KEITH/ERIC CHURCH concert [*8] . . . got Box seats . . . it's gonna be AWESOME!"
- "Tucker has his 1st bow class tonight . . . momma might fling a few too."
- "President/CEO at Full Time Stay At Home Momma . . . Studied at Graduate of the School of Hard Knocks . . . Married to Jared Lemons."
- "Full Time Stay At Home Momma with Jared Lemons. President/CEO[,] March 2008 to present. Blessed to be able to raise my baby cause my husband and bes friend is able to make that happen."

United States v. Lemons, 2015 U.S. App. LEXIS 11631, 7-8 (8th Cir. Mo. July 7, 2015)

During the trial, the witness introducing the conversation omitted the third party elements of the conversation and, when displayed to the jury, the third-party text elements were covered in response to requests by the Defendant. However, during jury deliberations, the jury had requested to review the evidence. Defense objected to sending in the full text version and again demanded redaction. The Defense objection was based on the hearsay rule and the balancing of prejudicial effect and probative value under Rule of Evidence 403. The Court sent the indictment and all exhibits, without redaction.

One comment was argued to be particularly prejudicial. The comment was made after Lemons wrote that "[t]he boys have gone fishing while I'm stuck here in this dang hunter safety class." A person identifying himself as "Eric Bradley" wrote, "Shouldn't you be teaching that class?"

The jury found Lemons guilty. Lemons appealed her conviction to the US Eighth Circuit Court of appeals on the claim, *inter alia*, that prejudicial hearsay had been erroneously admitted into evidence.

The Court examined the context of the introduced materials and noted that "[w]here a defendant's admissions are part of a conversation with a third party who is not a witness, the court has discretion to admit the non-witness's statements when they make the defendant's responses "intelligible to the jury and recognizable as admissions."" *United States v. Lemons*, 2015 U.S. App. LEXIS 11631 (8th Cir. Mo. July 7, 2015). The reason being that the third-party statements admitted to explain context are not offered for the truth of the matter asserted and are therefore not considered hearsay under Rule 801. Such statements "enlighten the jury about the meaning of admissions." *Lemons*, 2015 U.S. App. LEXIS 11631 (8th Cir. Mo. July 7, 2015).

When hearsay is admitted for a limited purpose, a limiting instruction is supposed to be

given to the jury to explain that. Here, the limitation would have been to clarify the nature of the responses in the conversation. But, in this case, that did not happen. Even so, the omission was ruled harmless error given the cumulative amount of evidence.

Though not relevant to this discussion of hearsay, Lemons had also argued on appeal that her sentence should have been calculated on actual loss to the government and not intended loss, which is calculated on the assumption that she would had continued collecting benefits until age 62, had she not been caught. In determining her *mens rea*, or her intent to continue committing this crime, the Court quoted her own response in a case review; "I hope that another Review is not necessary because holding my head down filling out this form is causing increased pain in my neck and back." *Lemons*, 2015 U.S. App. LEXIS 11631.

The conviction and sentence were affirmed.

Case: *United States v. Lemons*, 2015 U.S. App. LEXIS 11631, 1-5 (8th Cir. Mo. July 7, 2015)

This Article Presented by
David Phillips, Deputy City Attorney

Deadly Force, and Qualified Immunity; No "Mouthiness" Exception

Two off-duty Little Rock patrol officers, Donna Lesher and Tabitha McCrillis, entered the apartment of a 67-year-old unarmed man and fatally shot him while they were performing secondary employment for an apartment complex. The estate of the decedent sued the officers and the City of Little Rock alleging civil rights violations for the apartment entry, excessive non-lethal force and wrongful death. The District Court denied qualified immunity on all counts. The Defendant officers lodged an interlocutory appeal challenging that denial. The US Eighth Circuit Court of Appeals reviewed the case.

I. Facts.

As of 2010, pursuant to an agreement with the Big Country Chateau apartment complex, off-duty Little Rock police officers patrolled the apartments as secondary employment. On the evening in question, Lesher and McCrillis were patrolling the apartments when they noticed that the door to Ellison's apartment was open.

From outside, Lesher and McCrillis could see Ellison sitting on his couch inside the apartment. Ellison appeared relaxed, and was leaning on his cane. After Lesher and McCrillis started a conversation with Ellison, he responded that he did not want their help or attention and told the officers to leave him alone.

McCrillis thought Ellison was being mouthy with her and wanted to keep him from shutting the door on the officers. McCrillis stepped inside the apartment, followed by Lesher, and asked Ellison what was his problem. Ellison got up from the couch and approached the officers standing at the door. McCrillis shoved Ellison, Ellison pushed back, and a physical altercation ensued. During the course of the struggle, McCrillis and Lesher [*4] repeatedly struck Ellison and knocked off his glasses. Ellison repeatedly told the officers to get out of his apartment and to leave him alone.

At some point during the encounter, McCrillis requested help from back-up units at the Little

Rock Police Department. Officers Vincent Lucio and Brad Boyce arrived on the scene shortly thereafter. The physical altercation was over when Lucio and Boyce arrived, but Lesher was still inside the apartment, and Lucio reached inside to pull Lesher out.

The officers then instructed Ellison to lie down, and he refused. Lesher next told McCrillis that Ellison was getting his cane, and that she was going to shoot Ellison. She then fired two shots into the apartment, killing Ellison.

Ellison v. Lesher, 2015 U.S. App. LEXIS 13714, 3-4 (8th Cir. Ark. Aug. 6, 2015)

II. Law.

Qualified immunity shields police officers from liability in a § 1983 law suit unless their conduct violated a clearly established right of which a reasonable official would have known. The threshold issue is whether the state of the law at the time of an incident provided fair warning to the officers that their alleged conduct was unconstitutional

There is a "community caretaking or emergency aid" exception to the warrant requirement. " "A police officer may enter a residence without a warrant . . . where the officer has a reasonable belief that an emergency exists requiring his or her attention." *United States v. Quezada*, 448 F.3d 1005, 1007 (8th Cir. 2006); see *Ryburn v. Huff*, 132 S. Ct. 987, 990, 181 L. Ed. 2d 966 (2012); *Mincey v. Arizona*, 437 U.S. 385, 392-93, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978)." *Ellison v. Lesher*, 2015 U.S. App. LEXIS 13714 (8th Cir. Ark. Aug. 6, 2015).

The use of deadly force must be objectively reasonable. ""The use of deadly force is reasonable where an officer has probable cause to believe that a suspect poses a threat of serious physical harm to the officer or others." *Loch v. City of Litchfield*, 689 F.3d 961, 965 (8th Cir. 2012). But where a person "poses no immediate threat to the officer and no threat to others," deadly force is not justified. *Tennessee v. Garner*, 471 U.S. 1, 11, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985)." *Ellison v. Lesher*, 2015 U.S. App. LEXIS 13714 (8th Cir. Ark. Aug. 6, 2015).

III. Analysis.

The officers' argument that initial entry into the apartment was based on the need to render immediate aid was not persuasive. The factors they cited were an open door in a high crime area on a cold night and a disheveled apartment interior. The court found that the decedent's relaxed demeanor and his overt statement that he did not want help made further inquiry for that purpose unreasonable under settle case law. The Court noted that "while there are exceptions to the warrant requirement in exceptional situations, "mouthiness" of a resident is not one of them." Id. In arriving at this conclusion, the Court of Appeals deferred to the facts found by the District Court. The facts were disputed by the officers. But only matters of law can be challenged on an interlocutory appeal.

The Court found that "…Ellison, a 67 year old man, was standing in his own home when he was killed by Lesher, after she and McCrillis unlawfully entered his apartment and ignored his requests for them to leave. Although he was refusing to lie on the ground as the officers directed, the four officers, two male and two female, did not try to physically subdue him and it is undisputed that he was making no attempt to flee. Lesher also never warned him that she had a gun and would shoot if he did not drop his cane. *Ellison v. Lesher*, 2015 U.S. App. LEXIS 13714 (8th Cir. Ark. Aug. 6, 2015). As a result of these findings, the District Court held that Ellison did not pose an immediate threat of serious physical injury or death to any law enforcement personnel. Id.

Qualified immunity was denied in all but one count involving the minor injuries sustained in the attempt to arrest the decedent. Such injuries, relatively minor scrapes, bruises, and contusions, are considered "*de minimus*" and not actionable. The lower Court ruling denying qualified immunity was affirmed to that extent.

Case: *Ellison v. Lesher*, 2015 U.S. App. LEXIS 13714 (8th Cir. Ark. August 6, 2015)

This Article Presented by
David Phillips, Deputy City Attorney

Deadly Force, Arguable Reasonable Suspicion and Qualified Immunity; "It was a Dark and Rainy Evening..."

Phillip Ransom sued Kansas City Police Officers Tyrone Phillips and Angela Conaway-Dawdy, Kansas City Police Detectives Anthony Grisafe and Justin Randle, and Kansas City Police Sergeant Thomas Dearing under 42 U.S.C. § 1983, alleging that the defendants violated his rights under the Fourth and Fourteenth Amendments of the Constitution in an incident in which Officers fired eight shots at him at close range, then took him to the police station for questioning. The defendants moved for summary judgment and argued that they were entitled to qualified immunity. The district court denied the motion, leading to this interlocutory appeal.

I. Facts.

> It was a dark and rainy evening on November 11, 2010. Phillip Ransom was driving home from work in Lenexa, Kansas, to Kansas City, Missouri. Two miles before his exit, Ransom's van began backfiring, and he pulled over to the side of the road on Gregory Boulevard, near I-435. The sounds from his van alerted someone, who called 911 and reported that shots had been fired from or near a white van, though the caller did not report having seen flashes indicative of gunfire coming from the car. Officers Tyrone Phillips and Angela Conaway (now Conaway-Dawdy) responded to the call and drove their squad car toward the intersection.
>
> What happened once Officers Phillips and Conaway arrived at the scene was recorded by the dashboard camera inside the officers' squad car. ...
>
> The video shows the following: The officers pass by Ransom's van as they arrive at the scene. Officer Conaway says, "There's probably the van," which is white, corroborating the call. The car pulls behind Ransom's van, which has on its hazard lights. Only seconds later, the van backfires. (If the viewer watches closely, sparks can be seen shooting out from the van's tailpipe; the tailpipe visibly shakes as it fires.) Just after the backfire, the driver's-side door of the van opens. Officer Phillips yells, "Get back in the car." Ransom appears not to hear Officer Phillips and steps out of the van. As soon as he does, the two officers fire a total of eight shots. Ransom does not react as if he has been hit by any shot,[1] nor does he appear to notice that the officers have fired at him. Instead, he briefly looks around and then down at the tailpipe of the van, shakes his head side-to-side, and turns and walks to the front of the van. The officers report "shots fired" into the radio. Moments later, Ransom raises [*4] his hands from the front of his van. Officer Phillips yells, "Lay on the ground." Ransom lowers his hands to the side of the van, but he stays in front of the vehicle. Only his hands are visible. Officer Phillips asks Ransom, "Where's it coming from?," to which Ransom replies, "My van is backfiring." Officer Phillips asks, "Your van is backfiring?" but then adds, "No, it's not. Our window's shot out!"[2] Officer Phillips then orders Ransom to turn around and walk toward the squad car. Ransom complies and walks backward, toward the squad car and out of sight of the camera.
>
> Officer Phillips says to Officer Conaway, "That didn't sound like a backfire to me." Officer Conaway agrees. Officer Phillips says he heard "more than one. I heard, like, four." The Officers request back-up because they believe there may be another person there who had fired the shots, possibly from a ditch along the side of Gregory Boulevard. Officer Phillips asks Ransom [*5] if he has been shot; Ransom's response is inaudible. Ransom later tries to explain

"Blessed are the peacemakers for they shall be called the children of God."
Matthew 5:9

that the sound was from his van backfiring, but Officer Phillips says, "No, that was a gunshot." The officers tell Ransom they received a call about shots being fired and ask why he was getting out of his car. He explains that he thought his van was catching fire. Numerous other officers arrive and close off the area to the public. Near the end of the video, Officer Phillips can be heard telling another officer that he was sure he heard the sound of a gunshot, not a backfire, and that he heard it more than once.

FOOTNOTES

1 The parties stipulate that none of the bullets fired by Officers Phillips and Conaway struck Ransom.

2 As was later determined, the broken window and bullet holes found in the squad car were caused by the ricocheting bullets fired from the officers' own guns.

Ransom v. Grisafe, 2015 U.S. App. LEXIS 10441, 2-5 (8th Cir. Mo. June 22, 2015)

II. Law.

Qualified immunity protects government officials "'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). This immunity applies to discretionary functions of government actors, including the decision to use deadly force, see *Loch v. City of Litchfield*, 689 F.3d 961, 967 (8th Cir. 2012), and to detain an individual, see *Hart v. United States*, 630 F.3d 1085, 1090 (8th Cir. 2011) (discussing federal officers). To overcome the defense of qualified immunity, a plaintiff must show that the officers' actions violated a constitutional right that was "clearly established" at the time of their alleged misconduct. *Pearson*, 555 U.S. at 232. In other words, the officers must have been "plainly incompetent" or must have "knowingly violate[d] the law" when they committed the aggrieving act or seizure. *Ransom*, 2015 U.S. App. LEXIS 10441 at 12-13. The standard for evaluation of a claim of qualified immunity is "from the perspective of a reasonable police officer based on facts available to the officer at the time of the alleged constitutional violation." *Id*. Officers are judged by what they knew or should have known at the time of the seizure or deprivation of rights.

Officers are entitled to qualified immunity if there was "arguable probable cause" to detain [a suspect]. That is, the officers are immune from suit if they had "a mistaken but objectively reasonable belief" that [a supect] had committed a criminal offense. *Ransom*, 2015 U.S. App. LEXIS 10441. "When an officer is faced with conflicting information that cannot be immediately resolved, . . . he may have arguable probable cause to arrest a suspect." Id.

III. Analysis.

In asserting the defense of qualified immunity, the defendant officers initially argued that the act of firing their weapons at Ransom did not cause Ransom to be "seized" in the legal sense. They claimed that act did not "arrest his movements." Fortunately, in this case, the plaintiff was not hit by any of the 8 bullets fired at him from law enforcement officers.

In analyzing this argument, the Court noted that "[t]he use of deadly force is a seizure under the Fourth Amendment." *Id*, quoting *Craighead v. Lee*, 399 F.3d 954, 961 (8th Cir. 2005). The Court instead reviewed the facts to determine if the seizure was justified by a reasonable believe on the part of officers that they had probable cause to suspect that a threat of serious physical harm existed. The evidence indicated that the officers were responding to a call that shots had been fired, that the van was as the caller described, and they also heard noises that could easily be mistaken for gunfire. The Court concluded that their belief of imminent serious physical harm was

reasonable, though mistaken. The same factors extended to placing the plaintiff in handcuffs and detaining him.

Detectives Randall and Grisafe had transported the plaintiff to the police station for questioning. The plaintiff argued that this, too, was a deprivation of his civil rights. The Court examined whether "arguable probable cause" existed to retain the plaintiff in custody to be transported to the police station.

The Court concluded that, based upon the initial theory of the case, substantiated by an eye-witness report of incoming gunfire, bullet holes and a broken window in the police car, the Detectives had arguable probable cause to continue the plaintiff's detention.

The record indicated that the supervisor on scene, Sergeant Dearing, had concluded that no probable cause existed to continue Ransom's detention. The Court noted that Sergeant Dearing's conclusion was subjective. Only an objective change in facts can nullify arguable probable cause. Here, the facts were less documented and the timeline less clear as to what information had been passed along to the Detectives. But even if Dearing had communicated with the Detectives, the facts uncovered at that time still created arguable probable cause.

Qualified immunity was granted. The lower Court ruling was reversed and the complaint dismissed.

Case: *Ransom v. Grisafe*, 2015 U.S. App. LEXIS 10441, 2-5 (8th Cir. Mo. June 22, 2015)

This Article Presented by
David Phillips, Deputy City Attorney

Vehicle Color Discrepancy: Not Good Enough On Its Own For a Stop

Previously, we reported to you that a discrepancy between the color of a vehicle and the color listed on the registration is enough to stop a car for reasonable suspicion of criminal activity. However, the Arkansas Supreme Court has overturned that holding. Please make note of the new rule: *a discrepancy between the color of a vehicle and the color listed on the registration, absent other evidence or testimony, is not enough to stop a vehicle in Arkansas*.

Facts:

The facts in this case were reported by Senior Deputy City Attorney Taylor Samples in the April 2015 CALL: On November 24, 2011, at around 1:00 a.m., Rogers Police Officer Dustin Wiens was sitting inside a patrol car at an intersection when a vehicle driven by Jordan Schneider passed by. For no particular reason, Officer Wiens began to follow Schneider's vehicle and ran the vehicle license to check the year, make, model, and color of the car. The license plate check indicated that the car was a blue 1992 Chevrolet Camaro. Officer Wiens recalled seeing a red car when Schneider's car passed by, and Officer Wiens noticed while following Schneider's car that it had a black bumper. Officer Wiens never saw any blue on the car before pulling Schneider over, and Officer Wiens had no opportunity to pull up beside Schneider's car to look at the other side before making the traffic stop. According to Officer Wiens, making a traffic stop on Schneider's vehicle was necessary to investigate whether the car was stolen. Officer Wiens also conceded that but for the color discrepancy of Schneider's vehicle, he would not have stopped Schneider.

Case Analysis:

At the Circuit Court, Defendant moved to suppress evidence found as a result of the stop, which led to charges of possession of a controlled substance and possession of drug paraphernalia. The Defendant stated that there was no reasonable suspicion to make the initial stop. The Circuit Court denied Defendant's motion to suppress, and he entered a conditional plea of guilty to the charges.

The Court of Appeals upheld the decision of the Circuit Court. At the Court of Appeals level, the Court had acknowledged that in Florida, a discrepancy between the color of a vehicle and the color listed on the registration, standing alone, does not justify a traffic stop. *Van Teamer v. State*, 108 So. 3d 664 (Fla. App. Dist. 2013). However, the Court of Appeals found cases out of Georgie to be more persuasive. In *Thammasack v. State*, 323 Ga. App. 715 (Ga. Ct. App. 2013) and *Andrews v. State*, 289 Ga. App. 679, 658 S.E.2d 126 (Ga. Ct. App. 2008), the Georgia Court of Appeals held that a discrepancy between a car's color and the registered color allows an officer to stop a vehicle and investigate.

Though the Court of Appeals found the Georgia cases to be more persuasive, the Arkansas Supreme Court disagreed and found that *Van Teamer* from Florida was more persuasive given the facts presented in this case.

In Arkansas, a car owner is not required to notify the State when the color of the vehicle is altered. The same is true in Florida. In affirming the Florida Court of Appeal's ruling in *Van Teamer*, the Florida Supreme Court stated "the color discrepancy here is not 'inherently suspicious' or 'unusual' enough or so 'out of the ordinary' as to provide an officer with a reasonable suspicion of criminal activity, especially given the fact that it is not against the law in Florida to change the color of your vehicle without notifying the [state]." *State v. Teamer*, 151 So. 3d 421, 427 (Fla. 2014).

Here, the Arkansas Supreme Court found that Officer Wiens was "acting on a purely conjectural suspicion that appellant was engaged in illegal activity at the time he initiated the traffic stop." Therefore, the discrepancy in color did not give rise to reasonable suspicion. The Court held that the motion to suppress was denied in error and remanded the sentencing order of the Circuit Court.

Attorney's Note:

The Arkansas Supreme Court noted that at the Circuit Court level, there was no testimony from Officer Wiens that in his experience, car thieves change the color of vehicles or that a discrepancy was indicative of criminal activity that would possible allow "otherwise innocent behavior to give rise to a reasonable suspicion of criminal activity." This analysis by the Court may leave open the possibility that additional testimony could demonstrate that there is, in fact, reasonable suspicion. However, it would be unwise for an officer to pull over a vehicle based on such a discrepancy; he or she would be almost guaranteed to lose at a suppression hearing or be the next test case. For the time being, an officer will need to have more evidence to stop a vehicle.

Citation:

This case is an appeal from the Benton County Circuit Court, Honorable Judge Robin Green. Its case citation is *Schneider v. State*, 2015 Ark. 152.

This Article Presented by
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